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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service	))))	MM Docket No. 93-24

To: The Commission

COMMENTS OF CAI WIRELESS SYSTEMS, INC.

CAI Wireless Systems, Inc. ("CAI"), by its attorneys and pursuant to the Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-24, FCC 94-148, released July 6, 1994 ("NPRM"), hereby submits these comments.

The Commenter

CAI is a publicly-traded company whose primary business consists of owning and operating wireless cable systems. CAI currently operates wireless cable systems in Albany and Rochester, New York, and Norfolk/Virginia Beach, Virginia. CAI also has aggregated a portfolio of wireless channel rights, through ownership and channel capacity lease agreements, in Long Island, Buffalo and Syracuse, New York, Hartford, Connecticut and Boston, Massachusetts. CAI also is participating in a video dialtone trial with the Southern New England Telephone Company in West Hartford, Connecticut, and is actively pursuing strategic relationships with other regional telephone companies to develop low cost video distribution systems.

CAI endorses the vast majority of the proposals set forth in the NPRM, and encourages the Commission to continue to explore ways

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to facilitate the swift, rational and successful development of wireless cable.

I. **Expedited Processing**

CAI strongly supports the NPRM's proposal to create expedited processing standards where a wireless cable operator has aggregated a sufficient number of channels to offer a competitive video programming service. The minimum channel aggregation threshold should not be set higher than 12 channels, i.e., where a wireless cable operator has channel rights to at least 12 licensed or cut off and unopppposed channels.

CAI believes that a six-month construction requirement is a reasonable quid pro quo for obtaining expedited action. The Commission should make clear that this deadline will be strictly enforced. The Commission may wish to consider requiring proof of equipment and transmitter site availability to restrict this process to applicants that have the highest likelihood of initiating service promptly.

CAI empathically rejects the Wireless Cable Association proposal to require that an applicant hold rights to at least four MDS channels in order to obtain expedited processing. The critical issue is whether a wireless cable operator has sufficient channel aggregation to achieve market viability. CAI is developing certain markets almost exclusively on the basis of leased ITFS channel capacity, a strategy which fully conforms to FCC rules and policies. There is no principled basis on which to deny expedited processing to such applications.

Clearly, the WCA restriction is at odds with the direction of current policy. It is contrary to new Section 74.990-74.992 which permit wireless cable operators to hold ITFS frequencies in certain circumstances. New channel loading rules give added flexibility to both ITFS licensees and wireless cable lessees to meet the needs of receive site institutions and private customers with ITFS channels. The FCC's reorganizational efforts to consolidate ITFS and MMDS licensing functions will further obliterate the ITFS/MDS channel distinction. The WCA proposal is, at best, a historical curiosity which has no relevance to the future of ITFS service or the wireless cable industry.

II. **Financial Qualifications**

CAI supports the Commission efforts to clarify wireless cable operator financial qualification requirements. It believes that the broadcast model of a certification standard based on contemporaneous written documentation has much to recommend it. CAI is extremely concerned, however, about significant regulatory oversight in this area unless and until the FCC has substantial evidence of abuse. At that point, the better course may simply be to focus Commission resources on "problem" operators. Unless carefully approached, Commission activity in this area could consume substantial staffing and promote wasteful, anti-competitive and dilatory litigation.

In particular, CAI urges the Commission to exempt from all financial documentation requirements those publicly traded wireless cable operators with a market capitalization of at least $10 million. CAI must hold itself accountable to its shareholders and the rigorous demands of the public securities market on a daily basis. It must also satisfy telephone companies and other potential co-venturers that it has the financing, management and technical expertise to compete effectively in the video distribution marketplace. CAI's ability to acquire and develop the major markets in which it operates demonstrates its financial qualifications. In these circumstances, the utility of an added layer of FCC regulatory involvement is dubious. In short, no public interest benefit would be derived from the Commission's financial oversight of publicly traded companies. Accordingly, it should not impose any financial documentation requirements on publicly traded entities.

III. **Technical Processing Standards**

CAI strongly supports a number of technical proposals contained in the NPRM that will help eliminate or mandate the resolution of potential interference issues between applicants. Specifically, CAI supports the mandatory use of offset on a going forward basis to resolve predicted interference between applicants. It also supports applying a new station applicant's protected service area request on a prospective basis only. The new procedure would appear to compel new station applicants to propose PSA protection when an application is filed as a precautionary strategy. In these circumstances, the Commission may be better served simply by providing PSA protection automatically to every ITFS application at the time it is tendered. Finally, CAI is in general agreement with the proposal to provide protection only for those receive sites 35 miles or less from the transmitter. Rather than requiring a "showing of unique circumstances," however, protection should be routinely provided where an applicant demonstrates that it delivers an adequate strength signal to a receive site. Requiring prompt initiation of service to a protected receive site beyond the 35-mile limit should limit potential abuses of this policy.

IV. Application Caps

The imposition of a cap on the number of applications in which a wireless cable operator could hold channel rights during each window is fundamentally misguided. CAI supports the adoption of new policies to ensure that an ITFS applicant or the wireless cable operator on which it relies is financially qualified and that receive site institutions are committed to incorporating the programming proposed by the ITFS applicant in their curricula. If the Commission enforces these polices and the requirement that licensees promptly construct authorized facilities, the public will be fully protected from "frequency speculators." _Bona fide_ ITFS applicants who partner with financially qualified and committed wireless cable operators will successfully develop their systems. The FCC can employ summary cancellation procedures where the wireless cable operator is either unwilling or unable to meet the eighteen-month construction deadline. If certain operators habitually fail to honor construction commitments or seek to assign lease rights for unconstructed stations, the Commission has ample powers to investigate and, as necessary, sanction abuses of the licensing process.

Additional Commission regulation in this area is unwarranted. A wireless cable operator is, technically, not a party to the ITFS application and the Commission historically has not considered the qualifications of a wireless cable operator in assessing either the basic or comparative qualifications of an ITFS applicant. The substitution of one lessee for another is an issue about which the Commission has shown little or no interest.

The adoption of an applicant cap would mark a radical departure from current Commission practice. No FCC policy is served by impeding a ready, willing and able wireless cable operator's efforts to develop mutually beneficial relationships with an ITFS-qualified institution. A cap would restrict the universe of wireless cable operators with which an institution could contract. This would, inevitably, limit competition in the lease negotiation process and the opportunity for ITFS-qualified entities to bargain for the very best terms they can obtain. In many situations a cap would effectively eliminate any chance that an ITFS-qualified entity could initiate distant learning programs in the near future. These results would clearly disserve educational applicants and their wireless cable lessees. No cap of any form should be adopted.

The Commission should reject a cap on national ITFS filers for similar reasons. The ITFS comparative selection procedures substantially prefer local applicants. CAI fully supports this policy. However, where the choice is between relying on a non-local applicant to deliver educational programming to accredited local institutions which desire to incorporate such programming into their curricula and having no ITFS service at all, CAI respectfully submits that the FCC must favor the non-local applicant's proposal.

The NPRM is silent on whether major modification applications would count against cap. CAI urges the Commission to exclude all major modifications from any application cap. Modification applications are frequently necessitated by circumstances beyond the control of an ITFS licensee or its wireless cable operator lessee, such as the loss of a transmitter site. Moreover, the Commission should not create disincentives where a wireless cable operator desires to undertake a major technical change to improve service to ITFS receive sites or to wireless cable customers. CAI is currently planning or implementing facilities improvements in most of its markets. As its business grows and technology presents new opportunities, an application cap which includes modification applications could severely restrict its ability to provide superior technical service to receive site entities and its customers. If applications proposing such changes were to count against a restrictive cap, a wireless cable operator could be forced to conclude that its long-term viability compels it first to seek new station authorizations.

V. Frequency of Windows

The wireless cable business is truly an industry in metamorphosis. With access to capital and programming, industry experts envision rapid growth in total subscribers, average penetration levels and industry revenue. Paul Kagan Associates, Inc. estimates a seventeen fold increase in total annual revenues, from $100 million to $1.7 billion, between 1993 and 2001. It is clear, however, that this growth also must stand on a third leg -- access to channels. While the Commission must take steps to prevent abuses of the licensing process, enforcement must not become a cure which kills the patient. If inordinate Commission resources are devoted to enforcement and the licensing process becomes a litigious battleground, delay will be the only certain result. The FCC's real mission -- to provide consumers with home video programming distribution alternatives -- will go unrealized.

In recognition of the vitality of the wireless cable industry the FCC should open windows not less than four times each year. Sufficient resources should be made available to substantially complete application processing, at least with respect to those applications not in conflict with other applications filed during the particular window, during each three-month period. The adoption of the low power television practice of opening a window approximately once each year would be particularly devastating to the wireless cable industry at this time. The FCC should assign additional staff during the first window to handle the demand that has built up since the adoption of the 1993 freeze on new ITFS station applications.

VI. Additional Proposals

In Paragraph 41 of the NPRM, the Commission invites commenters to introduce other proposals. CAI takes this opportunity to focus the Commission's attention on the rules and policies that limit an ITFS excess channel capacity lease to a maximum ten-year term, or the remainder of the ITFS license, whichever is shorter. While CAI applauds the Commission's significant efforts in the recent past in rationalizing its rules, this limitation remains a significant and unnecessary burden.

By far the most unique challenge that CAI and other wireless cable operators face in developing wireless cable systems, and of generally competing in the multichannel video distribution marketplace, is finding ways to utilize the twenty ITFS frequencies in each market in a way that will allow a commercial enterprise to thrive. CAI, as much as any wireless cable operator, has seen the ITFS capacity lease arrangement as an opportunity to create "win-win" arrangements with educators. CAI prides itself as a company on crafting lease arrangements that are fair and generous, and that provide the educator with the resources to develop effective and sophisticated distance learning facilities.

Nevertheless, CAI, like all wireless cable operators, must deal daily with the tensions these lease arrangements create, tensions which can hamper its ability to carry on a reliable, long-term, stable enterprise. The Commission's current rules dictate that CAI cannot insure that it will have long-term access to twenty of the thirty-two to thirty-three video channels that form the very backbone of its business.

This uncertainty creates myriad problems for any wireless cable operator, much less a publicly-traded company that seeks to attract significant sums of money from an investment community that carefully analyzes long-term industry trends. In addition, because CAI is endeavoring to form mutually beneficial relationships with telephone companies, the uncertainty over how long CAI will have access to its critical mass of channels creates difficult hurdles for CAI to overcome as it attempts to establish a comfort level on the part of telephone companies.

Telephone companies typically engage in planning that extends well beyond ten years for the simple reason that its capital interest is usually too large to contemplate only a ten-year term. If, for example, a telephone company is considering utilizing CAI's capabilities to form a part of its video distribution enterprise, CAI's inability to guarantee the telephone company access to its microwave frequencies for longer than ten years creates a significant disincentive for the telephone company to do business with CAI, regardless of the near term synergies.

For the wireless operator too, ten years is an extremely brief period of time to make investments of millions of dollars into each wireless cable system. For each wireless cable system CAI develops, CAI builds significant plant, hires workforces of dozens of people, and spends enormous money, time and energy developing a subscriber base. At present, after ten years of expending money, time and energy, over half of CAI's channel capacity in each market will become subject to termination. To CAI, and certainly to every wireless cable operator in the country, this is a shocking possibility.

Since, in practical terms, the most the Commission's rules presently allow is for the wireless operator to reserve a right of first refusal on the terms of an extension, when these channel leases near termination, there will be nothing to prevent third parties from entering into negotiations with ITFS licensees and taking advantage of the original wireless operator's ten year investment. The third party will not have spent a dime on developing the system. Yet, by acquiring lease rights, the third party will be able to gain enormous leverage over the incumbent operator, and piggyback on all of the incumbent's marketing efforts over the past ten years.

CAI urges the Commission to rethink its policy of limiting ITFS lease terms to ten years. CAI encourages the Commission to lengthen the permissible term, or to eliminate term limitations entirely. It is CAI's experience that ITFS licensees do not need the protection of the Commission's rules in this regard. As the holders of vital channel capacity, the ITFS licensee has all of the negotiating leverage it needs. ITFS licensees and their FCC counsel are sophisticated enough to negotiate terms in ITFS lease agreements that afford them whatever flexibility they might anticipate needing after the first ten years of the contract.

This proposal merely suggests that the Commission's rules allow the ITFS licensee flexibility to negotiate terms of excess capacity lease agreements, rather than to take way the ITFS licensee's discretion in this regard.

Respectfully submitted,

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